

CRIMINAL APPEAL NOS.605 AND 666 OF 1989.

Date of decision: 22.1.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. M.J. Budhbhatti, advocate for appellants in both appeals.

Mr. K.P. Raval, A.P.P. for respondent-State in both appeals.

1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

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January 22, 1996.

Oral judgment (Per Jain, J.)

Criminal Appeal No.605 of 1989 has been preferred by original accused No.2, Hasankha Jumeekha whereas Criminal Appeal No.666 of 1989 has been preferred by original accused No.1, Khatuben Haji Pira, who is the widow of deceased Haji Vira (also described as Haji Pira at many

places). Both the appeals are arising from the judgment delivered on 13.9.1989 by the learned Additional Sessions Judge, Junagadh, in Criminal Case No.138 of 1988, whereby he has convicted accused No.1 for the offence under Sections 302 and 201 read with Section 34 of the Indian Penal Code and accused No.2 for the offence under Sections 302 and 201 of the Indian Penal Code and both of them were sentenced to undergo rigorous imprisonment for life.

Briefly stated, the facts giving rise to the present appeals are as under:

That the accused No.1 was in love with accused No.2 and, therefore, accused No.2 wanted to eliminate the husband of accused No.1. In order to do so, accused No.2 went to the hut of accused No.1 and the deceased on 20.8.1988 at about 3 A.M. and knocked the door. Accused No.1 opened the door. The accused No.2 entered and gave a blow with scythe (dharia) to Haji Vira, who was sleeping. That the blow resulted as a fatal blow and Haji Vira died. Thereafter, with a view to destroy evidence, took away the body of Haji Pira and threw in Singoda river. Next morning the Police Patel received information about a dead body lying in river and informed the police authority. The Police, after investigation, ultimately arrested accused Nos.1 and 2, who came to be tried for the offences referred to above and offences being proved, the trial Court convicted and sentenced both the accused to suffer rigorous imprisonment for life.

In this case, the prosecution has examined as many as 12 witnesses. But for the purpose of these appeals, Mr. Budhbhatti, learned advocate appearing for the appellants, has referred to the evidence of two witnesses only, which, according to him, is very much relevant.

Evidence of Prosecution Witness No.5, Farida Haji, is at Ex.16 and the evidence of independent witness, Babu Rakhu, P.W.6, is at Ex.17. Prosecution witness No.5, Farida is the daughter of the deceased and accused No.1, was aged about 6 years and according to the prosecution, she is an eye witness as she was present at the relevant time and place. Whereas evidence of P.W.6 is relevant as it is the case of the prosecution that accused No.2 had made extra judicial confession to him. The learned Additional Sessions Judge, relying upon the evidence of the above witnesses along with others, convicted both the accused.

It cannot be gainsaid that Prosecution Witness ( "P.W."

for short) No.5, Farida, daughter of deceased and accused No.1, has categorically deposed that at the time when the door was knocked by accused No.2, she and her mother, accused No.1, got up, her mother opened the door and accused No.2 armed with deadly weapon like scythe (dharia) entered the room and gave fatal blow upon her father, who was sleeping on a separate cot. She has categorically stated that after giving fatal blow, with a view to destroy evidence, the weapon was cleaned with a piece of cloth and thereafter the accused No.2 took away the dead body out of the house. She has further stated that at that time a kerosene lamp was burning in the hut and in the light of said lamp she could see the entire event. She had gone to the extent of saying that if the weapon is shown to her she can easily identify the same. Thereafter, muddamal article, which is alleged to have been used by accused No.2 to kill the deceased, was shown to her and she could identify the same. Of course, she was cross-examined in detail but on the relevant points she has not been shaken except for bringing on the record an omission to the effect that "when the door was knocked, she and her mother, accused No.1, had awoken and her mother opened the door" was not stated in her statement before Police. In para 3 of her cross-examination, it has also been brought on record that before coming to Court for deposing she was tutored by her uncle. In her cross-examination she has also admitted that whatever she was tutored was told by her in the Court. However, she has denied the suggestion challenging her presence at the relevant time and place.

The evidence of P.W.6, Babu Rakhu, is at Ex.17. This witness is related to the deceased who is his maternal uncle. He also knows accused No.2. Since the accused No.2 used to visit his galla for purchasing pan, beedi, etc., had developed intimacy and closeness and hence oftenly accused No.2 used to disclose some confidential matters regarding his illicit and extramarital relations with accused No.1 about the intention of accused No.1 to eliminate deceased Haji Vira. Not only this, this witness had gone to the extent of saying that even after commission of offence accused No.2 contacted him and told him about the incident and elimination of deceased Haji Vira and about throwing dead body in the river with a view to destroy evidence, qua the incident. Of course, this witness has been cross-examined at length. But, to our utter surprise, he has not been cross-examined on the question of extra judicial confession. Since neither the factum has been challenged nor any question has been put as regards making of confession we hold that the accused No.2 did make extra judicial confession about the

incident and his involvement. Keeping these facts in mind, we now appreciate rival contentions.

It is rightly argued by Mr. Budhbhatti, the learned advocate for the appellants, that the learned Judge has relied upon circumstantial evidence alongwith the evidence of above-referred both witnesses but the circumstantial evidence is not sufficient to form the chain-link so as to connect the accused No.1 with the commission of offence. Not only this, but there is nothing on record to show that accused No.1 shared common intention with accused No.2 for commission of this offence. If we turn to the evidence of P.W.5, Farida, daughter of accused No.1 and the deceased, nothing can be inferred about involvement of accused No.1 in the commission of the offence. Mr. Raval, learned A.P.P. has vehemently argued that her conduct is relevant from which inference can be drawn about her intention, if not common intention. As a cardinal rule, in order to sustain conviction under Section 34 of the Indian Penal Code, the prosecution must prove common intention beyond all reasonable doubts. There may be similar intention of parties but there may not necessarily be common intention. For the sake of arguments even accepting the submission of the learned A.P.P. Mr. Raval that if we infer the same intention, then also it may not be of any help to the prosecution for the simple reason that if the Court relies upon such circumstances then the accused has to be confronted and explanation should have been sought under Section 313 of the Criminal Procedure Code. While confronting accused No.1 under Section 313 of the Criminal Procedure Code, not a single question had been put about her conduct, motive and intention as sought to be relied from the evidence of P.W.No.5 and as argued by the learned A.P.P. Mr. Raval. In absence of any other cogent and reliable evidence, in our view, the evidence of P.W.5 is very weak to rope in the accused No.1 in the commission of offence alongwith accused No.2. It is true that accused No.1 had opened the door and kept silence and did not raise any alarm for help. One does not know, by seeing accused No.2 with deadly arm, she might have been frightened and shocked by the incidence and with such sudden development it may not be possible for a poor helpless lady to raise any alarm or shout for assistance or help from nearby people or neighbours and, therefore, mere silence on her part cannot be inferred as sharing common intention with accused No.2. Secondly, under such circumstances, namely, seeing accused No.2, armed with deadly weapon, in odd hours, that is, in the early morning hours, accused No.1 might have been frightened and might not have been able to think as to what to be

done. If that being so, the evidence is not sufficient to establish her involvement in the commission of offence. About natural conduct of accused No.1 under such circumstances as inferred above, we are fortified by the evidence of P.W.5 as brought in cross-examination that when accused No.2 gave blow she and her mother, accused No.1, both were weeping. Had she shared common intention, she would not have wept on seeing assault on her husband.

Now, coming to the evidence of P.W.6, Babu Rakhu, in our view, his evidence is of no help to the prosecution to prove involvement of accused No.1 in commission of the offence. What is said by this witness is about the intention disclosed to this witness prior to commission of offence and extra judicial confession after commission of offence. The witness nowhere says that the accused No.1 ever had made any confessional statement before him and, therefore, even if accused No.2 had made any confessional statement involving accused No.1, the same cannot be used against her to form basis for conviction.

On perusal of judgment, it appears that the learned Additional Sessions Judge has relied upon this evidence as a sole piece of evidence to rope in accused No.1 alongwith accused No.2 in the commission of offence. But, in the facts and circumstances discussed hereinabove, we are unable to convince ourselves to agree with the learned Additional Sessions Judge and to uphold the conviction against accused No.1 more particularly when the circumstances which he has referred to in the judgment paragraphs 16 and 17 were never put to accused No.1 while seeking explanation under Section 313 of the Criminal Procedure Code. As a cardinal rule, the circumstances which arise from the record against the accused and no clarification has been sought from the accused can never be relied upon by the prosecution or court for basing conviction. In this view of the facts, we are unable to uphold conviction against accused No.1 and, therefore, Criminal Appeal No.666 of 1989 preferred by original accused No.1 against the judgment of the learned Additional Sessions Judge dated 13.9.1989 deserves to be allowed.

It is true that the evidence of child witness has to be scrutinised meticulously and carefully without blindly following the same. But again while placing reliance on the evidence of child witness one has to bear in mind the circumstances in which it is forthcoming, including presence and knowledge. From the deposition of P.W.5, at Ex.16, it transpires that the child witness was not

administered oath as the learned trial Judge had ascertained for not doing so and was amply satisfied. But that does not mean that her evidence cannot be relied upon. Her presence at the time of commission of offence and at the scene of offence was natural cannot be ruled out. More particularly when on this count her testimony has not been challenged in any way. She was in company of accused No.1 and the deceased in natural course and all of them were sleeping in the same hut. She has also explained that when the door was knocked by somebody from outside, she alongwith accused No.1 awoke and accused No.1 opened the door paving way for accused No.2 to enter. At that time she was awoken and was fully conscious to see and understand. For identity she has explained that she could see the incident in the light of the kerosene lamp which was burning in the hut. This fact goes unchallenged in cross-examination on behalf of accused No.2. If that be the circumstance, we have no reason to discard the evidence of this witness only on the ground that she happens to be a child witness. She has identified accused No.2 and has described the incident in its chronological events.

Mr. Budhbhatti, learned advocate for the appellants, has invited our attention to para 3 of her deposition, Ex.16, wherein, during cross-examination she has admitted that before coming to Court, she was tutored by her uncle as to what is to be deposed. But that does not mean that she was prepared to depose against accused No.2 only. In natural course, before deposing in the Court after lapse of time, anybody would think of refreshing the memory so that the deposition may go on in proper order and if the witness is child witness then there is nothing wrong if tutored to refresh memory. Hence we are unable to agree with the contention raised by Mr. Budhbhatti, learned advocate for the appellants, that this witness was tutored only with a view to falsely implicate and rope in accused No.2 in the incident so as to discard her evidence. Similarly, our attention is also drawn to an admission in connection with some omission but in our view, that omission is not that much material for the simple reason that the place of occurrence is not in dispute at all, may be the manner and method in dispute. Therefore, when there is an admitted fact that main entrance of the hut was chained or closed from inside, an outsider can enter in the hut only if it is opened. In that view of fact, we are of the opinion that this omission may not be of much relevance and may not adversely affect the case of prosecution as identity and presence in hut remains established beyond doubt. Evidence of child witness coupled with extra judicial

confession of accused No.2 before the P.W.6, carries much weight and is of much importance. P.W.6 has in terms and categorically stated about confession by accused No.2 after commission of offence. On the face of it, this appears to be voluntarily, without any inducement or force. The accused No.2 had reason to make confession as had developed intimacy, confidence and closeness as being regular visitor and customer of the witness and therefore, confession would be reliable and important for the purpose of this case. Not only this, on the point of extra judicial confession, the witness has not been cross-examined, meaning thereby, this version of witness has gone unchallenged. Further, no circumstance has been brought on record as to why the evidence of this witness should not be accepted and relied upon or is tainted one. The learned Additional Sessions Judge has rightly put emphasis upon the extra judicial confession of respondent No.2 and has appreciated the evidence in light of evidence of child witness, P.W.5 for convicting accused No.2. With this material on record, we are unable to agree with Mr. Budhbhatti that this is a case of 'no evidence' or 'weak evidence'. If the evidence is coming in natural course and is otherwise reliable and trustworthy, is sufficient to convict a person and the case of the prosecution is not required to be fortified, by examining other witnesses on the same point as will tantamount to repetition. The law does not say that evidence of a particular witness if is otherwise trustworthy and reliable, the same is again required to be corroborated by other similarly situated witnesses.

Learned A.P.P. Mr. Raval has also drawn our attention to evidence of P.W.8, Ashokkumar Dungarbhai, at Ex.19. This evidence has gone unchallenged as was not cross-examined. According to this witness, accused No.2 was in company of this witness in the late hours, i.e., 12 O' clock, mid night, at a nearby agricultural field, and both were awakening and were chitchatting and thereafter this witness had gone to bed with clear instruction to accused No.2 to keep watch of the field. In the morning, when this witness got up at about 6 A.M., accused No.2 was not found and was seen entering the field with something like weapon in his hand. On being shown the weapon, Muddamal Article No.3, this witness has identified saying that while accused No.2 entered the field in the morning, he was carrying the same weapon. On being questioned, accused No.2 vaguely replied that he had gone to do some work and there upon was reprimanded by this witness for leaving the field without his notice and knowledge. Version of this witness has gone unchallenged and, therefore, this unchallenged and

uncontroverted version has to be looked into and appreciated in light of the evidence of other witnesses, i.e., P.W.5 and 6.

The incident occurred at about 3 AM as per case of the prosecution and presence of accused No.2 at the place of incident is established by child witness, P.W.5. Upto 12 O' clock, in the late night hours, accused No.2 was found in company with Ashokkumar Dungarbhai, P.W.8. Thereafter his presence has been again established at the agricultural field at 6.00 A.M. If the accused No.2 had not left the field where is the question of entry at 6.00 A.M.? No satisfactory explanation has been given by accused No.2 in his examination under Section 313 of the Criminal Procedure Code despite he was categorically confronted. He has come out with the case of mere denial only which, in our opinion and in the light of circumstances, is not palatable and, therefore, combined reading of evidence of P.W.5, 6 and 8, coupled with the evidence of Investigating Officer, we are of the opinion that the learned trial Judge has rightly decided against accused No.2 and convicted and sentenced him for the offence under Section 302 read with Section 201 of the Indian Penal Code.

For the sake of repetition, we may say that even on the question of destroying evidence, the child witness has not been cross-examined and, therefore, this part of the evidence roping accused No.2 for removal of dead body with an intention to destroy the evidence also goes unchallenged and remains established beyond all reasonable doubts. We are, therefore, in full agreement with the view of the learned trial Judge and uphold conviction of accused No.2.

At this stage, Mr. Budhbhatti, learned advocate for the appellants, has tried to convince us that since it is a case of single blow, the case falls under Section 304 of Indian Penal Code. Merely because the death has resulted on account of single blow may not be a ground for taking out the case from the purview of Section 302 of Indian Penal Code and to bring it within the ambit of Section 304 of Indian Penal Code. It depends upon the type and kind of weapon, the part of body at which the blow is inflicted and the intention. If a single blow, may be with any kind of weapon, is inflicted on vital part of body with intention to cause death, is sufficient to bring the offence within the purview of Section 302 of the Indian Penal Code.

Medical Officer, Dr. Rameshchandra Fulshanker Vyas, P.W.

1, is examined at Ex.8 and post-mortem note is produced at Ex.9. While describing the injury, he has categorically stated that the injury was ante-mortem and was sufficient to cause death in ordinary course of nature. During cross-examination, a suggestion was also made by the learned advocate for the defence that such injury could have been caused in the event of fall in water got dashed with sharp pointed stone. But the same was turned down flatly by the witness. A futile exercise was also made to suggest that such injury could have also been caused if one is attacked by wild animal. But the same was also turned down and denied by the doctor on the face of it. It appears that the injury was on vital part, that is, neck and the gravity is shown in para 17 of the post-mortem report, Ex.9. For the sake of convenience, the same is reproduced hereunder:

"(1) One incised wound in front of the neck, below the chin extending from 2" below the left ear-labule, to the right side, upto the angle of right mandible, above the thyroid cartilage, with clean-cut margins, 7" in length. Muscles of the neck cut at the site of injury. Large vessels of the neck cut at the site of injury. Wind-pipe cut anteriorly at the site of injury. Neck is swollen below the injury mark. Blood fluid oozing from the wound on the left side."

The post-mortem report shows that muscles and large vessels of the neck were cut at the site of injury. Wind-pipe was cut anteriorly at the site of injury. In our opinion, a single blow inflicted with deadly weapon at the vital part with an intention to kill the victim causing such injuries is sufficient to bring the case within the arena of Section 302 of the Indian Penal Code and, therefore, we are unable to agree with the submission of learned advocate Mr. Budhbhatti.

For the reasons stated hereinabove, we hold that the learned Additional Sessions Judge was right in convicting original accused No.2, appellant of Criminal Appeal No.605 of 1989, for commission of offence punishable under Section 302 read with Section 201 of the Indian Penal Code. In this view of facts, we find no reason to disturb the conviction and sentence of accused No.2 and, therefore, appeal preferred by original accused No.2, i.e., appellant in Criminal Appeal No.605 of 1989 deserves to be dismissed.

In the result, we pass the following order:

Criminal Appeal No.605 of 1989 preferred by Hasankha Jumeekha, original accused No.2, is hereby dismissed.

Criminal Appeal No.666 of 1989 preferred by Khatuben Haji Vira, original accused No.1, is allowed. Judgment and order of the learned Additional Sessions Judge, Junagadh, convicting and sentencing accused No.1, is hereby set aside and she is acquitted and is ordered to be set free forthwith if not required in any other case and if not on bail. If original accused No.1, appellant in Criminal Appeal No.666 of 1989, is on bail her bail bonds stand cancelled.